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May 1, 2018

Chief Brian Manley
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LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on May 2, 2017 by Austin Police Department Officer James Harvel causing fatal injury to Jason Roque.*

Dear Chief Manley:

The Office of the Travis County District Attorney has reviewed the Austin Police Department Special Investigation Unit (APD SIU) investigation of the above-referenced matter and concluded our independent review of the officer-involved shooting in which Austin Police Department Officer James Harvel shot Jason Roque. This letter is to inform you of my decision to decline prosecution of criminal charges against Officer Harvel. My decision does not limit or address administrative action by the Austin Police Department, or other civil actions, where non-criminal issues may be reviewed and where different rules and lower levels of proof apply.

The District Attorney's Office has reviewed the investigation of the Austin Police Department into this incident pursuant to the officer-involved shooting protocol that is attached and posted on the District Attorney official website.¹ A copy of this letter will also be posted on the District Attorney official website.

Based on the available evidence and under applicable Texas law,² I am convinced that a jury following the law would not convict Officer Harvel because the evidence proves his use of force was justified under Texas law as a lawful exercise of defense of a third person. The following

¹ <https://www.traviscountytexas.gov/district-attorney/cru>

² In arriving at this conclusion, I have relied upon the legal guidelines governing the use of force/deadly force in Texas as set forth in sections 9.32, 9.33 and 9.51 of the Texas Penal Code, the case authority construing that provision, and the United States Supreme Court case authority governing law enforcement use of force. (See applicable laws in Appendix)

sets forth the facts determined during our review and provides the legal analysis underlying my decision.

911 CALLS

At 11:03 a.m. on May 2, 2017, the decedent Jason Roque called 911. He requested a police officer respond to 11313 Long Winter Drive in the Pioneer Crossing neighborhood. He described seeing someone walking around with a gun and “going crazy.” He said the man was pointing a black pistol in the air and aiming it at the house. He described the man as Hispanic, with brown shorts and no shirt. He denied knowing who the man was. The 911 call taker advised that she would send an officer to the location and then ended the call. Subsequent investigation revealed that Roque did not actually witness what he described, but instead was attempting to summon police to his location.

Roque’s mother, Albina Roque, also called 911. She had just arrived home from work to find something wrong with her son. She said Roque had a fight with his girlfriend and that he was not ok and needed help. Throughout the call, Ms. Roque pleaded with Roque to calm down and pleaded with the call taker that she needed help. She described Roque as wearing denim blue jeans and no shirt. Ms. Roque was aware that Roque had already called 911 himself. The call taker asked if Roque had any weapons. Ms. Roque responded that he had a weapon tucked in the front of his pants but that it was a toy. The call taker asked Ms. Roque to clarify whether Roque was carrying a weapon or a toy. Ms. Roque responded “It’s just that I don’t know, I don’t know.”³ Roque is heard in the background saying “It’s not a toy.” The call taker asked if Roque wanted to kill himself or someone else and Ms. Roque responded “yes yes yes.” Roque is heard in the background saying “I’m not playing” and “That’s why I wanted to walk down so you wouldn’t see this.” Ms. Roque then said “Give me that. Give me that, please. Give me that.” To which Roque replied “No. No.” Just before the call ended, the call taker asked whether Roque had the weapon outside or whether it was still in his pants. Ms. Roque replied that it was in his pants and said, “Please honey, don’t – don’t do that to me.” The call then abruptly ended.

As police arrived and the event continued to unfold, more people called 911. One caller said someone was shooting a gun outside her house on Dry Season Trail. She later described seeing police officers chasing someone who was holding a gun to his head. A second caller was on the way to his house on Flushwing Drive when he said he heard three gunshots. As he continued approaching his house, he described seeing a police vehicle parked in the street. A third caller said she heard two or three gunshots as well as a man and a woman yelling and screaming at each other on Long Winter Drive.

POLICE RESPONSE AND CRITICAL CONFRONTATION

Officer C. Connelly arrived first on scene at approximately 11:20 a.m. in response to the “gun urgent” call and staged behind the cover of a stone column at southwest corner of Musket Valley Trail and Long Winter Drive, out of sight of the residence. While waiting for backup to arrive, Officer Connelly requested dispatch to confirm with Ms. Roque whether Roque still had a gun,

³ Quoted language from Ms. Roque’s call to 911 has been translated from Spanish to English for this document.

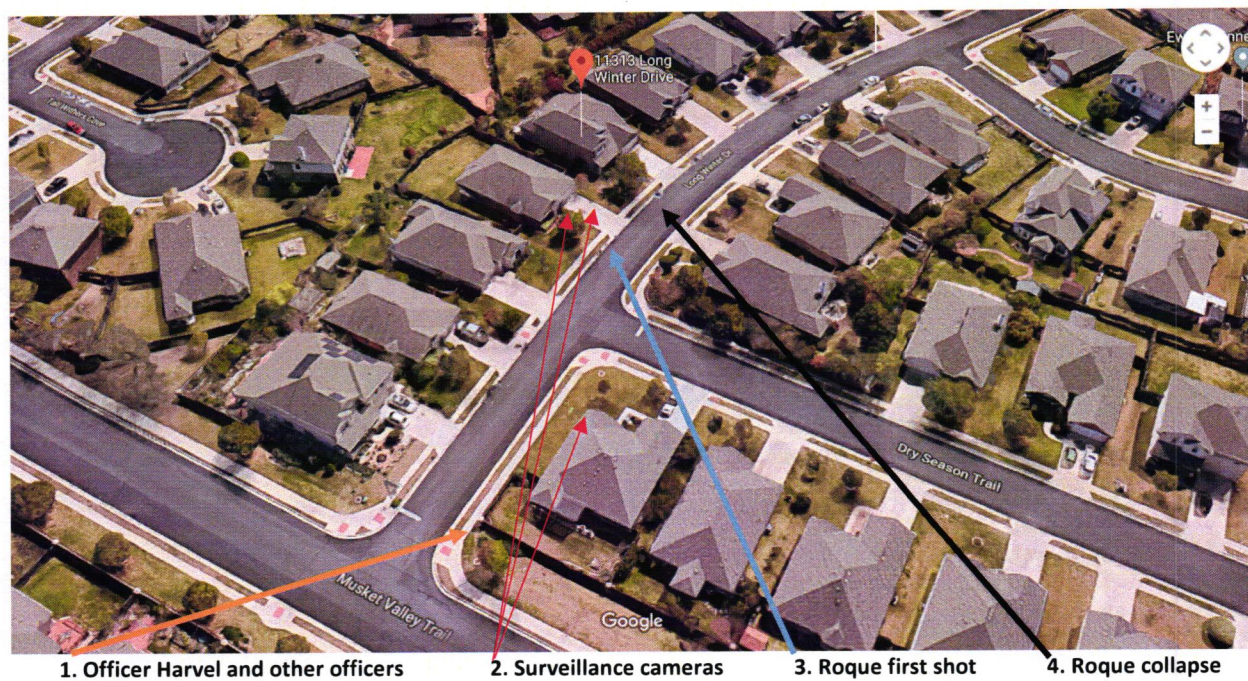
and if he did, to instruct him to put it down. Officers P. Nelsen, J. Ayers, W. Rounds, and J. Harvel arrived shortly thereafter and took cover behind the stone column with Officer Connelly. All officers were wearing department-issued APD uniforms. During this time, dispatch updated the nature of the call to "attempted suicide" based on statements made during Roque's call to 911.

The officers made a "stack" formation (essentially a single-file line behind the safety of the stone pillar) and began to develop a plan of approach toward the residence at 11313 Long Winter Drive when they heard Roque and Ms. Roque yelling from the front yard of their residence. The officers broke formation to see Roque in the front yard. Roque was wearing a black shirt and blue jeans and had what appeared to be a black semi-automatic pistol tucked into his waistband. The officers identified themselves as Austin Police and yelled at Roque to show his hands and that they just wanted to talk to him. Roque walked up the sidewalk toward the officers empty-handed with his arms outstretched to his sides and yelled statements to the effect of "Just shoot me," "Just kill me," "Don't make me shoot myself," and "I'll shoot myself."

Officer Nelsen requested one of the officers get a less-lethal shotgun⁴ because of the distance to Roque and the ineffectiveness of a Taser at that range. No less-lethal shotgun was immediately available so Officer Rounds requested one over the radio. Roque then stopped, pulled the pistol from his waistband, and pointed it at his own head. The officers yelled at Roque to put the gun down. After a few seconds, Roque turned around and began walking down the sidewalk back toward 11313 Long Winter Drive where Ms. Roque was still yelling in the front yard. Roque continued holding the pistol pointed at his head but dropped it down to his side, keeping it in his hand, after approximately three steps back toward the residence. After approximately eight steps back toward the residence, Roque turned his upper body to the right and pointed the pistol in the direction of the officers. Officer Harvel immediately fired his rifle one time at Roque, striking him in the right rib cage just below the armpit. Roque bent forward at the waist, dropped his pistol to the sidewalk, and began running away from the officers but now angling off of the sidewalk and toward the center of the street.

Approximately three seconds after firing his first shot, Officer Harvel fired a second time. Approximately two seconds after his second shot, Officer Harvel fired a third time. One of the shots missed, while the other struck Roque either on the left hip exiting the upper left buttock, or on the upper left buttock exiting the left hip. Roque fell to the ground near the middle of the street in front of 11312 Long Winter Drive. Unable to see where the pistol was, the officers moved toward Roque in a tactical wedge formation still keeping him at gunpoint. Officers arrived to find Roque lying on his back with his hands empty. Officer Nelsen dragged Roque four to five feet away from where he fell in an attempt to separate him from his pistol, secure him, and begin medical treatment. Officers searched Roque for weapons but found none. Officer Ayers looked back along Roque's path of travel and located the pistol on the sidewalk near the place where Roque was walking at the time of the first shot. Once Roque's pistol was secured, officers administered first aid until paramedics and firefighters arrived on scene and took over.

⁴ A bean bag round is loaded into a less-lethal shotgun and its deployment is intended to disable the person without killing him. Shotguns dedicated to being used for bean bag rounds are often visibly modified with either yellow or green markings, or bright orange stocks to reduce the possibility that a user might inadvertently load lethal munitions into the weapon.



Approximate view of Officer Harvel at the time he fired



Surveillance footage showing Roque holding pistol approximately one second before Officer Harvel's first shot



Roque's pistol

OFFICER HARVEL'S STATEMENTS

Officer Harvel completed a "walk-through"⁵ in the hours after the event in the presence of his attorney and multiple agency representatives, including the District Attorney's Office. Officer Harvel also gave subsequent interviews to APD Internal Affairs and the APD Special Investigations Unit.

Relevant excerpts from the transcript of Officer Harvel's SIU interview are below:

240 Q: So starting with the first thing you know about the call just tell me, uh -
 241 tell me what you remember what happened.
 242
 243 A: Okay. So over the radio 'cause I'm at the - I'm at the desktop doing the
 244 form. I was just kind of shutting that stuff down. Call comes out.
 245 Disturbance with gun. Subject in the street waving a gun around. Uh, I
 246 hear several units going to it. Uh, walk out to my car. Get in the car.
 247 Uh, started - pull up on the map to see if I'm anywhere even close to it.
 248 Uh, pops up that not too far. Uh, a lot of units going. But it sound like
 249 as it went on, uh, that the guy - whoever had called it in they couldn't
 250 see the guy anymore. So I start thinking well they're gonna be looking
 251 for this guy. Maybe he might be in a house. They're gonna need more
 252 people there if - if they have to surround a house or something...
 253
 254 Q: Mm-hm.
 255
 256 A: ...to that effect. Or he's randomly walking around and someone - you
 257 know they might need help looking for him or cordoning off the, uh -
 258 the area. So I start going that way. Plug into the ma- or plug into the
 259 call that I'm on my way. I'm driving to the call. Updates start on the call
 260 as far as they can't see him anymore. And at this point it's just
 261 disturbance gun call. I believe from what - what I'm seeing. And as I'm
 262 driving that direction I hit the call zoom so I can see kind of where the
 263 people are coming and how the- who's showing up first. Before first
 264 units arrive the call changes to I believe they were saying it was a
 265 disturbance inside the residence. That someone had called inside the
 266 residence that now he's inside the house. It's the same location where
 267 they saw him walking around outside with the gun.
 268
 269 Q: Okay.
 270

⁵ "Walk-through"-shortly after an officer-involved shooting occurs, investigators often ask the officers who fired shots if they would be willing to participate in a walk-through of the scene to explain how the critical incident unfolded. The "walk-through" assists the crime scene technicians in the collection of evidence and gives those investigating and monitoring the investigation a better understanding of what occurred.

271 A: As I'm going to it, um, they're saying maybe he has a gun, maybe he
272 doesn't. Then some - there was an update that he has the gun in his
273 pocket. And it's still just a disturbance. They're trying to make call
274 back. There's an open line at some point. I'm thinking that more than
275 likely what will happen is that this is gonna be a - uh, we'll do a
276 perimeter around that house, um, once we get enough assets there.
277 Uh, less lethal. Um, some sort of lethal to be able to contain it to - to
278 that situation - that - contain it to that structure. As I'm en route the first
279 officer there I believe was, uh, Officer Connelly. He's saying I'm there.
280 But I'm staging here. I wanna wait for a couple more units to show up.
281 Uh, more updates come, um, that it's his mother calling in. Uh, I didn't
282 see attempted suicide in the call until I was opening the door as I
283 stopped.

284
285 Q: Okay.

286
287 A: Um, as updates are coming in I'm trying to listen to 'em. I'm trying to
288 not to read them 'cause I'm driving pretty quickly there. I don't
289 remember it being hot shot either. So I'm not running code. I'm driving
290 there pretty quickly though. And I don't wanna look at every update
291 and end up crashing. I was tellin', uh, Grant that just had an ONA not
292 long ago that somebody was going to and one of the guys got into an
293 accident on (unintelligible). So I'm trying to avoid that. Trying to be as
294 safe as I can getting there. As I pull in I remember glancing down. At
295 this point I'm thinking it's gonna be a barricaded subject inside that
296 house from all the updates. So I thought I'll grab, uh - my - my plate
297 carrier and rifle. As I'm grabbing that I look down and I see it updated
298 now on the title code as attempted suicide. And I was still kind of trying
299 to hear everything and drive at the same time so I was a little confused
300 as to where that came from. Um, as I'm stepping out of the car to move
301 up I'm believing that this guy is still barricaded in the house. But I start
302 hearing commands from officers that are ahead of me at the
303 intersection. I stopped on - I cannot remember the name of that street -
304 but it was the cross street that, uh - the actual street that everything
305 happened on. It was like a T intersection to it. Um, the - the - to our
306 curb line - the - the curb line that we stopped on all the houses - none

307 of the houses face that street. It was like the - the front of the
308 neighborhood. So it was backyard fences. At the street that this
309 occurred on there's a - those backyard fences come up. And there's a
310 huge, um, rock column kind of like for the entrance of the
311 neighborhood I believe. So I hear 'em giving commands there. Um, I - I
312 know this guy is already on the street. I know from the calls that he had
313 a gun. Um, that there's some kind of disturbance. I wanna get there
314 quickly. One of the officers in front of me was just opening his door. I
315 didn't wanna fumble with that vest. So I said, "Hey let me throw this in

INTERVIEW WITH OFC. JAMES HARVEL

Interviewed By: Det. Jonathan Riley and Det. Ricardo Pelayo

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316 your car." I throw the vest in his car. And I jog up to the, uh - to the
317 corner where the other officers were giving commands to him at. Uh, I
318 heard in the press conference they said we approached the - the
319 people. We never approached them. We were - they were calling out
320 for less lethal. They were calling to get a taser up. At this point as I get
321 there I look at the distance that the fella is from us. He's 35 to 40 yards
322 at that point. And taser's not gonna do any good. Even less lethal
323 shotgun is not gonna do any good at that point.

324
325 Q: Mm-hm.

326
327 A: But we're not gonna approach him until we have all those assets in
328 place. So as we stop there - we're calling for those things. I believe
329 one of the guys was en route usually carries the less lethal with him -
330 212. But he hadn't made it to the scene yet. As I post up there, um, the

331 subject doesn't have any, uh - weapons. His hands are free. We post
332 up on that - on that brick or rock column that's there. Um, one of the
333 officers is giving commands. I come up next to him. And I'm covering
334 down on the subject. I believe the officer next to me has a handgun.
335 And someone else had a shotgun. And even the buck shot at - that -
336 that range I don't know how comfortable they would feel with a - with
337 using the - the rifle at that point. Was probably, uh, the only thing that
338 could have effectively - at least that I felt confident with engage the
339 subject if he had posed a threat to us at that point. Uh, so that point
340 they're giving commands to him. I'm watching him. I'm covering him.
341 He reaches into his right pocket. Uh, he - he was yelling as I was
342 running up. I could hear him saying "Shoot me - shoot me" as I come
343 around the corner. His hands are still out. Uh, I don't remember if he
344 yelled it again at that point. He is yelling some things. It's hard for him
345 to understand him at that point over the officers giving commands and
346 him yelling. I see his hand go into his pocket - right hand goes into his
347 pocket. He starts to pull a pistol out. At that point I felt threatened to us
348 - the officers. I felt like he was gonna draw it and try to shoot us. Um,
349 as I - I put him in my sights I could see a woman standing directly
350 behind him in my line of sight. And, um, the backdrop wasn't clear. Uh,
351 one of the things that - that - that I have to think about in any kind of
352 encounter like that is not just from you to your target, but what's
353 beyond your target. Because as rounds don't stop just because they hit
354 someone. So I - at that point - the reason I didn't fire was because she
355 was in the backdrop. And I feared that if I was to shoot it was gonna -
356 high likely chance of hitting her as well. So real quickly through my
357 mind I was thinking "okay I can step across the street and she'll be out
358 of that - that, um - that backdrop." Um, but this happened fluidly within
359 a few seconds. As - as he had the gun out it come up to his fore- or to
360 the side of his head and he holds it here. Uh, we had a little bit of cover

361 where we were. Um, I still felt like we were in danger because it would
362 be a split second for him just to turn the gun and start firing at us if he
363 chose to. Um, we had a little bit of cover where we were. But still felt
364 unsafe at that point. But he yelled something or another. Then he
365 turned away from us. When he turned away from us he still had the
366 gun in his right hand and he starts walking directly down the curb line
367 that he was at towards the female that was there. Uh, at this time I
368 didn't know that was his mother. I didn't know who the female was. I
369 just saw him walking towards her. Uh, through training and experience
370 from being - where - I'm an adjunct fire instructor and I help out at the
371 range from time to time. I helped out through all the qualifications
372 whenever we were doing, uh - the transition from the Smith and
373 Wesson originally with a 40 caliber Smith and Wesson. Uh, through
374 training that we do when I was on SWAT where you'd work the line as
375 an instructor we would do moving and shooting. And so as we had
376 people walk away from us towards the targets, um, I had a lot of - lot of
377 hours watching people shoot and walk towards a target. He's walking
378 towards her, uh, the - there'd already been a disturbance. There's
379 already, um - you know he - apparently putting the gun to his head -
380 yelling shoot me - I - I don't believe this person has respect for his own
381 life. I have no reason to believe he has respect for anyone else's life at
382 that point. Um, so I'm starting to fear is he going towards her to - to
383 shoot her? Is he going to her to hurt her - to harm her? Um, but as he's
384 walking one of the things I picked up from - from being on the range
385 and seeing people move and shoot is a normal walk and a normal gait
386 you'll see their hands swing and elbows swing as you're behind them.
387 Um, I saw one - two maybe steps. I don't know exactly how many. But
388 there were a couple steps where I saw the - the hand swing - the
389 elbow swing. And then he starts stepping and that elbow's not
390 swinging behind him anymore. And from my training I've seen people
391 walk and shoot and - and that elbow doesn't come back anymore
392 because it's pointing at something. I can't see what direction the barrel
393 is pointing. I can't see if the pistol is actually pointing directly at her. But
394 I can see that elbow's not coming back anymore. And so I'm fearing
395 now - it's not coming back because it's pointing at something. And -
396 and he's walking directly towards her. I - I think he's pointing at her.
397 Um, I don't want to let this threat manifest itself into an assault before I

398 take action because my fear there is he shoots her I'm gonna have to
399 take action against him. And now two people are shot that day. Um, so
400 at that point I made a split second decision to - to stop him from what I
401 thought he was about to do. And I thought he was about to shoot her.
402 Uh, I fire one shot. He - he staggers a little bit. I see a reaction from
403 him. But he's still facing kind of in that direction it - it appears. Um, I'm
404 looking through an optic. It's not magnified. So the - the size of - of
405 what I'm looking at is - is the same size as everybody else standing

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406 there looking at it with their naked eye. But it's now zeroed down to just
407 the optics that I see. Um, he staggers a little bit forward and still
408 keeping his shoulders kinda towards her. I fired two more shots and
409 then he staggers and - and falls down, um, a - a little bit of a distance
410 from where the original shot went off. Uh, he - he goes on the ground.
411 Um, I'm still covering on him - following through in case he starts to do
412 anything from there. In case his hands come up with the pistol towards
413 us. When he fell he - he staggered. He fell onto his back. His - his
414 head was pointing, um - so as we're looking down the street his feet
415 are kind of towards us - but kind of angled towards the curb line as
416 well. So he's kind of diagonal through the street. I can't see the right
417 side anymore where the gun was originally in his hand. I could see the
418 left hand's clear. I'm watching him. People are starting to - other
419 officers are starting to call out information on the radio. Um, shots were
420 fired, officer involved. No officers were harmed. One subject's down -
421 these type of things. I don't - I don't know exactly the details on -

422 exactly what they're saying. I'm covering him. I'm listening - but I'm still
423 focused on is he going to - to do anything from this point. Um, as
424 they're doing that I start to say "Hey this is all important stuff to put out
425 and everything, but we need to go down there, secure him and provide
426 some kind of medical attention to him now." That's our responsibility to
427 do that. So I - I acknowledge that to them. I tell them, "Hey that's - we
428 need to do this now. We need to - we need to form up - move over
429 there." That was the only approach we ever did to that because we
430 were waiting for all those less lethal options before. But it happened
431 within maybe three seconds if that - um, all of that occurred. So we're
432 posted like I said at that - at that rock wall or column. Um, I say "Hey
433 we need to move down there. We need to secure him. And provide
434 some kind of medical attention." So quickly - and I don't know who -
435 who all was with me moving up. I know definitely that, uh, Officer
436 Nelson was because he was right off the one side of me. And I know
437 that, um - officer, uh - Ayers moved up with us as well. There was I
438 believe someone else. I - I was focused on him. I don't remember
439 exactly which officer was moving up with us. They acknowledged to
440 me "Yes we need to do that." We start to push up. Um, as we're
441 moving up I'm trying to see that right hand that's not exposed to us
442 anymore 'cause I'm - I'm kind of figuring that gun might still be in his
443 hand. We start moving up towards him. I'm trying to push over to the -
444 to his right side - my left side 'cause he- the way he's laying. And - and
445 see what's there in his hand. They kept wanting to push to the right for
446 us - to his left side. And I guess maybe to cover towards the house and
447 see 'cause we didn't know if there was someone else involved in the
448 house. We didn't know if someone else was gonna come out now
449 angry because of what just happened and try to retaliate on - on us.
450 Um, so we finally moved up where I could see his right hand. I was

451 ordering him to raise his hand. He's not responding at that point. We
452 get close enough I can see the right hand's clear. Um, I believe it's
453 Officer Ayers that sees the pistol. Uh, a few paces back probably in the
454 area where - where the original shot went off. Um, he says "I got it right
455 here." I tell him to cover that. Keep - keep it and just keep an eye on
456 the - the house. Um, I believe it was Officer Nelson originally gloved up
457 and started trying to do medical - medical attention for him. Um, we're
458 calling for EMS and all that. It's clear for them to move up. Uh,
459 someone - and I don't know which officer it was - moves up. Starts to
460 talk to the woman who I realize halfway through us moving up there
461 from someone saying that that was actually his mother which I didn't
462 know. And, uh, I - I - that part right there is kind of - kind of crazy to me
463 that she - she saw all that. And, um - and not knowing that that was her
464 originally. But, um, so someone moves up to talk to - to her. We're
465 doing medical attention on him. Fire shows up. They move up. They're
466 asking us to move units so that ambulance can get in there. But the
467 ambulance ended up coming up a different street. There were some
468 officers running around trying to move vehicles - get stuff like that, um,
469 taken care of. And - yeah EMS gets there. They start to work on him.
470 They load him up and off to the hospital. Um, about that time is when
471 my corporal showed up. He asked me to come back, um, and wait for
472 him by his vehicles. And - and the officers on the scene started
473 handling everything from there. And I - I don't know what happened
474 from that point on in the call. I went back to the car. Um, I secured my
475 rifle. I didn't wanna be standing there still with my rifle out. There was
476 no one to like hand it over to at that point. So I secured at my vehicle.
477 Um, called CLEAT attorneys. Called my wife I was involved in
478 something. And not to - not to worry. That I'd get with her later. And -
479 and then the process started from there.

OTHER EVIDENCE REVIEWED

Other evidence reviewed in this matter includes audio recordings of the incident taken from microphones attached to the officers' uniforms as well as video footage taken from multiple private home surveillance cameras in the area of the incident. Virtually the entire confrontation was recorded on video by these private home surveillance cameras. We also reviewed the sworn statements of the other APD officers present at the time of the incident, the sworn statements of Roque's parents Mr. Vicente Roque and Ms. Albina Roque, the sworn statement of a neighbor who partially witnessed the event, and the interviews of Roque's girlfriend and her parents. We also reviewed what appears to be a suicide note written by Roque.

FIREARM AND TOOLMARK ANALYSIS

APD Firearm and Toolmark Examiner Greg Karim responded to the scene. Mr. Karim checked for bullet "defects" (marks or damage caused by a bullet strike) on the structures and vehicles in the likely path of Officer Harvel's bullets, but found none.

Mr. Karim measured the distances between Officer Harvel's location at the time he fired and the location of Roque's pistol and the apparent blood stain in the street from where Roque fell. The

distance between Officer Harvel's position and Roque's pistol was approximately 231 feet. The distance between Officer Harvel's position and the apparent blood stain was approximately 191 feet.

Mr. Karim examined Officer Harvel's pistol at the scene and concluded it was consistent with not having been fired in the incident. Having not been fired, the pistol was neither collected nor microscopically examined.

Mr. Karim collected evidence at the scene including Officer Harvel's rifle; the magazine contained in the rifle; the ammunition contained in the rifle and magazine; three .223 caliber fired cartridge cases found on the ground near the stone pillar; a fired projectile located on the sidewalk in front of 11317 Long Winter Drive where Roque was first shot; and Roque's pistol.

Mr. Karim examined Officer Harvel's rifle in the APD firearms lab. The rifle is a Larue Tactical model LT-15 5.56 caliber single-action, semi-automatic, short-barrel rifle. The rifle had no unauthorized modifications or configurations. The rifle was test-fired and found to function normally and be capable of discharging live rounds.

Mr. Karim examined Roque's pistol in the firearms lab. The pistol is an Umarex brand .177 caliber BB pistol, model XBG. The pistol had missing and broken parts and did not contain a CO₂ cartridge or BBs. This model BB pistol was noted to be similar in appearance to a Springfield Armory XD pistol.

Mr. Karim microscopically examined the fired cartridge cases found on the ground near the stone pillar. The fired cartridge cases were positively identified as having been fired from Officer Harvel's rifle.

Mr. Karim microscopically examined the fired projectile found on the sidewalk in front of 11317 Long Winter Drive as well as three fragments of a fired projectile collected during Roque's autopsy. The fired projectile found at the scene was positively identified as having been fired from Officer Harvel's rifle. The three projectile fragments collected during Roque's autopsy were also identified as having been fired from Officer Harvel's rifle and determined to be a single entity prior to being fractured.

In reviewing video footage from the home surveillance cameras that recorded the incident, APD SIU detectives later found that the footage captured what appeared to be a bullet strike on the driveway of 11313 Long Winter Drive. Mr. Karim returned to the scene on May 5, 2017, and located a defect in that driveway that appeared to be consistent with a bullet strike as depicted in the video. Mr. Karim did not locate any secondary strikes to the structure at 11309 Long Winter Drive (the house that would have been in the continuing path of the projectile), or any fired projectiles or projectile fragments from that bullet strike. Mr. Karim theorized that the projectile likely fragmented upon impact with the driveway surface.

MEDICAL EXAMINER

A postmortem examination was performed on May 3, 2017 by Dr. Keith Pinkard, the Chief Medical Examiner for the Travis County Medical Examiner's Office. Dr. Pinkard found the cause of death to be gunshot wounds and the manner of death to be homicide.⁶ Roque was found to have two gunshot wounds. One entered the right side of the chest and exited the left side of the chest, then continued into the left arm and exited the left arm. The other wound involved the left hip and the left upper buttock near the spine, but it was not possible to determine which wound was the entrance wound and which was the exit wound. Toxicology testing demonstrated a low concentration of alprazolam and compounds found in marijuana. There were no other notable findings.

LEGAL ANALYSIS

We begin by analyzing Officer's Harvel's actions taken against Jason Roque. We decide whether, when considered alone, his actions could potentially constitute a crime. If we find no potential crime, our analysis ends. If, however, we find that Officer Harvel's actions could potentially constitute a crime, we then analyze whether circumstances exist that could justify his actions and constitute a legal defense to prosecution.

Potential Offense Committed by Officer Harvel:

MURDER: A person commits the offense of murder if he intentionally or knowingly causes the death of an individual; or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.⁷

Officer Harvel admits to intentionally shooting Roque with a rifle. Officer Harvel's intent in shooting Roque with a rifle can be inferred as intending to cause serious bodily injury. Shooting Roque with a rifle was an act clearly dangerous to human life, and in this case did in fact cause the death of Roque. A preliminary analysis therefore shows Officer Harvel's conduct in intentionally shooting Roque with a rifle and causing his death meets the elements of murder and could subject him to criminal prosecution.

Potential Defense to Criminal Prosecution:

It is a defense to criminal prosecution if a person's conduct is justified.⁸ Based on the facts, sworn statements, and other evidence in this case, a potential justification for Officer Harvel's conduct, and thus a potential defense to criminal prosecution, is defense of a third person.

⁶ Homicide is the killing of one person by another. Homicide is to be differentiated from murder, which is the unlawful killing of one person by another

⁷ Tex. Penal Code § 19.02(b)

⁸ Tex. Penal Code § 9.02

DEFENSE OF A THIRD PERSON: A person is justified in using deadly force against another to protect a third person if under the circumstances as the actor reasonably believes them to be, the actor would be justified in using deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect, and the actor reasonably believes that his intervention is immediately necessary to protect the third person.⁹

Application of the Law to the Facts:

The developing information provided by dispatch to arriving officers was that a man, later identified as Roque, was agitated, was armed with a gun, was waving it around in the air, was arguing with a woman, and was suicidal/homicidal. Efforts were made to determine whether the gun was real or not, but that fact was not resolved prior to the confrontation, and it wasn't fully resolved until it was examined by the APD Firearms Examiner. The pistol, though in reality was a non-functioning BB gun, was similar enough in appearance to an actual firearm that officers were justified in treating it as an actual firearm until determined otherwise.

Rather than rush in and force a confrontation, the officers staged a number of houses away from Roque's residence. When officers first spotted Roque, he was yelling back and forth with Ms. Roque in the front yard area of their residence. Roque then immediately began walking toward officers. He drew his pistol, pointed it at his own head, and disregarded commands to drop the weapon. He communicated verbal and non-verbal suicidal ideations to them. Roque then turned around and started walking back in the direction of Ms. Roque who was still in her front yard. Officer Harvel stated that he believed, based on Roque's agitation, his possession of a pistol, his disregard of commands to drop the pistol, his walking path leading toward Ms. Roque, and his body language in pointing the pistol at Ms. Roque, that Roque was preparing to shoot Ms. Roque. Officer Harvel stated he fired at Roque to stop him from shooting Ms. Roque. When the first shot failed to stop Roque's movement toward Ms. Roque, he fired two more times until Roque collapsed onto the street.

Officer Nelsen similarly stated he believed that Roque was walking toward Ms. Roque with the intent to shoot her or take her hostage. He stated that he began lining up the sights of his pistol on Roque at the time Harvel fired, but had not yet fired himself because the distance to Roque coupled with Roque's movement presented a difficult shot with his pistol. Officer Ayers stated he was not sure why Roque turned around and started walking back toward Ms. Roque, but considered the possibilities that he was either going to become a threat to Ms. Roque or take cover behind a vehicle. Officer Connelly did not address in his statement what he believed Roque's intent to be in walking toward Ms. Roque. Officer Rounds stated that his view of Roque prior to and during the shooting was obstructed because he was behind the other four officers behind the stone pillar.

⁹ Tex. Penal Code § 9.33. *See also* Tex. Penal Code § 9.31, Self-defense: A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force; & § 9.32, Deadly Force in Defense of Person: A person is justified in using deadly force against another if the actor would be justified in using force against the other as described above, and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force.

CONCLUSION

Criminal liability against Officer Harvel for murder is established only if the evidence proves beyond a reasonable doubt that all elements of the offense have been committed.¹⁰ Further, if Officer Harvel produces some evidence of justification, the State must prove beyond a reasonable doubt that the offense was committed without any legal justifications raised by the evidence.¹¹

We believe the evidence shows Officer Harvel has a legal justification for his conduct that would likely prevail at trial. We believe a jury would find that Officer Harvel reasonably interpreted Roque's actions as an attempted use of deadly force against Ms. Roque. We believe a jury would find that Officer Harvel's three shots at Roque were a reasonable use of deadly force in defense of a third person because Officer Harvel reasonably believed that his intervention was immediately necessary to protect Ms. Roque from Roque's attempted use of unlawful deadly force against her. That Roque did not in fact have a deadly weapon at the time he was shot is of no consequence as Officer Harvel reasonably believed he did. Similarly, the fact that Roque may not have in fact intended to harm Ms. Roque is of no consequence because the reasonableness of Officer Harvel's belief is to be interpreted from Officer Harvel's point of view under the totality of facts and inferences available to him at the time he acted and not with the benefit of hindsight or other facts and circumstances unknown to him. The law does not require that Roque *actually* posed a risk of deadly harm but only that Officer Harvel *reasonably believed* he did at the time he took action.

For the above reasons, we conclude that criminal charges against Officer Harvel are neither appropriate nor supportable under the law. Consequently, we will seek no indictments. We are closing our review and will take no further action in this matter.

We have released a press packet of evidence that we reviewed in making this decision. The packet includes offense reports, forensic reports, officer statements, witness statements, photos, videos, and other miscellaneous evidence. The packet is available to the press as well as any interested citizen. This decision will be posted on the Travis County District Attorney website and will be accessible under Jason Roque and the date of the incident, May 2, 2017.¹²

Very truly yours,


Margaret Moore

¹⁰ Tex. Penal Code § 2.01

¹¹ *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991); *Jenkins v. State*, 740 S.W.2d 435 (Tex. Crim. App. 1983)

¹² <https://www.traviscountytexas.gov/district-attorney/cru>